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CHARLES ELMORE

IN THE

Supreme Court of the United States

October Term, 1945.

No. [redacted] 109

MERCHANTS and MANUFACTURERS ASSOCIATION OF LOS ANGELES, a California corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support Thereof.

HARRY WILLIAM ELLIOTT,
JOHN F. GILBERT,
510 West Sixth Street, Los Angeles 14, Calif.,
Counsel for Petitioner.

C. R. LESLIE,
Of Counsel.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

SUBJECT INDEX.

PAGE

Petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit 1

I.

Summary statement of matter involved 2

II.

Jurisdiction 8

III.

Questions involved 8

1. The following questions concerning the scope of the injunction are involved 8
2. Has the right of freedom of speech been abridged? 9
3. Evidentiary questions involved 9

IV.

Reasons relied on for allowance of writ 12

Brief in support of petition for writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit 15

TABLE OF AUTHORITIES CITED.

CASES.

	PAGE
Bridges v. California, 314 U. S. 252	29
Consolidated Edison Co., etc., et al., v. N. L. R. B., 305 U. S. 197	23
Cudahy Packing Co. v. N. L. R. B., 116 F. (2d) 367	26
Everglades Drainage District v. Florida Ranch & Dairy Corp., 74 P. (2d) 914	26
Magnolia Petroleum Co. v. N. L. R. B., 112 F. (2d) 545	26
Marsh v. State of Alabama, 66 S. Ct. 276	28
May Department Stores Co. v. N. L. R. B., 66 S. Ct. 203	15, 20
McFarland v. American Sugar Refining Co., 241 U. S. 79	24
National Labor Relations Board v. American Pearl Button Co. and Washington Chamber of Commerce, Washington, Iowa, 149 F. (2d) 311	17, 23
National Labor Relations Board v. Cheney California Lumber Co., 66 S. Ct. 553	19
National Labor Relations Board v. Express Publishing Co., 312 U. S. 426	16, 20
Phelps Dodge Corp. v. N. L. R. B., 313 U. S. 177	20
Roberts & Oaks and the Chamber of Commerce of Madison, South Dakota, etc., 50 N. L. R. B. 494	16, 23
St. Joseph Stock Yarks Co. v. United States, 298 U. S. 38	24
Thomas v. Collins, 323 U. S. 819, 65 S. Ct. 315	28
United States v. Nelson, 102 F. (2d) 515	26

STATUTES.

Judicial Code, Sec. 240 (28 U. S. C. A. 347)	8
National Labor Relations Act, Sec. 2, Subsec. 2	6
National Labor Relations Act, Sec. 7	19
National Labor Relations Act, Sec. 8(1)	2
National Labor Relations Act, Sec. 8(2)	2

PAGE

National Labor Relations Act, Sec. 10(b) 24
National Labor Relations Act, Sec. 10(e) 19
United States Codes, Annotated, Title 29, Sec. 160(e) 8
United States Constitution, First Amendment 27
United States Constitution, Fifth Amendment 11
United States Constitution, Fourteenth Amendment 11

TEXTBOOKS.

Wigmore on Evidence, Sec. 304 25
Wigmore on Evidence, Vol. 2, Sec. 304, p. 204 25

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

Merchants and Manufacturers Association of Los Angeles, a California corporation, petitions this Honorable Court and prays that a Writ of Certiorari may issue to review the judgment of the Ninth Circuit Court of Appeals entered August 30, 1945, and amended March 2, 1946, in the case entitled "National Labor Relations Board, Petitioner, vs. Sun Tent-Luebbert Company, *et al.*, Merchants and Manufacturers Association of Los Angeles, Respondents," No. 10533 in said Circuit Court. Said judgment as amended was entered upon a petition filed by the National Labor Relations Board for a Writ

of Enforcement of the Order made and entered by the Board on November 29, 1941, in the matter entitled "Sun Tent-Luebbert Company; California Canvas Jobbers Club; Southern Californians, Inc.; The Neutral Thousands, Inc.; G. L. Huff and Clay C. Rittenhouse, doing business as Employees Advisory Service; and Merchants and Manufacturers Association of Los Angeles and Textile Workers Union of America, Local No. 99, C. I. O. and Independent Canvas Workers Union, Inc., Party to the Contract, Case No. XXI-C-1007, etc."

I.

Summary Statement of Matter Involved.

The National Labor Relations Board filed a complaint against the Sun Tent-Leubbert Company and three other canvas manufacturing companies, and against the Merchants and Manufacturers Association of Los Angeles (hereinafter for convenience referred to as M & M), and three other so-called institutional respondents charging a violation of the National Labor Relations Act. Section 10 of the complaint charged all of the respondents together with a violation of Section 8(2) of the Act in that they "did instigate and form a labor organization referred to herein as the Independent, and since that date said respondents continuously have dominated and interfered with the formation and administration of said labor organization by the following acts," specifying a series of acts in support of the general allegation. By Section 12 of the complaint the respondents were likewise specifically charged with violation of Section 8(1) of the Act "by instigating, permitting, acquiescing in and causing the acts set forth in the preceding paragraph 10 and by other acts did interfere with, restrain, and coerce

their employees in the exercise of rights guaranteed in Section 7 of the National Labor Relations Act, and by these acts and each of them did engage in and are engaging in unfair labor practices within the meaning of Section 8, subsection (1) of said Act."

The Board, after extended hearings, found that the Independent Union was company dominated and issued its order against all of the respondents in accordance with the intermediate report and recommendations of the trial examiner. Exceptions were filed to the intermediate report and argument was had before the Board in which all of the questions hereinbelow specified were raised and argued without effect.

The Board thereafter petitioned the Circuit Court of Appeals for the Ninth Circuit for a judgment enforcing the order of the Board. The matter was argued and briefed and the points theretofore raised before the Board and other questions of law were briefed and argued before the Ninth Circuit Court of Appeals. The Circuit Court of Appeals thereafter under the date of August 30, 1945, made and entered its judgment enforcing in part the order of the Board, but limiting the scope of the Board's order so far as it affected this petitioning respondent. Both this respondent and the Board petitioned the Circuit Court for a rehearing, and such petitions were denied by order of the court on December 28, 1945. Thereafter the Circuit Court on its own initiative by order entered March 2, 1946, amended its former judgment and directed the enforcement of the order of the Board in its entirety, reinstating in the scope of its judgment those portions of the order of the Board which had formerly been omitted from the scope of the judgment of the court.

of Enforcement of the Order made and entered by the Board on November 29, 1941, in the matter entitled "Sun Tent-Luebbert Company; California Canvas Jobbers Club; Southern Californians, Inc.; The Neutral Thousands, Inc.; G. L. Huff and Clay C. Rittenhouse, doing business as Employees Advisory Service; and Merchants and Manufacturers Association of Los Angeles and Textile Workers Union of America, Local No. 99, C. I. O. and Independent Canvas Workers Union, Inc., Party to the Contract, Case No. XXI-C-1007, etc."

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In the autumn of 1937 the Textile Workers Union affiliated with the C. I. O. and the Upholsters International Union affiliated with the A. F. of L. conducted an active campaign to organize all employees of the canvas companies. At the commencement of this campaign one of the canvas companies, Mellus Brothers & Company, Inc., was a member of M & M and the other canvas manufacturing companies joined M & M in the autumn of 1937. While this organizational campaign was in progress a subordinate employee of M & M, Ryerson by name, whose duty it was to obtain statistical data from employers relating to wages, job classifications, hours and working conditions, called upon respondents Rittenhouse and Huff requesting that they organize or set up an independent union for the entire canvas manufacturing industry, and according to Rittenhouse' testimony, Ryerson supplied or furnished names of employees within the canvas manufacturing companies, including some supervisory employees, through whom Rittenhouse and Huff operated and with whose assistance the independent union was set up.

Petitioner, Merchants and Manufacturers Association of Los Angeles, is a non-profit corporation, organized in 1896, "to promote the business interests of Los Angeles City and County and the country tributary thereto." At the time of the hearing there were in excess of twelve hundred members, drawn from all classes of industry and the professions; membership was available to "any person, firm, association or corporation doing a merchandising, manufacturing, banking, professional or other business requiring employment of unskilled, skilled or professional labor." M & M was maintained entirely by initiation fees and dues from members. No employees

of M & M are involved, there is no labor dispute of any kind between M & M and its employees, and no unfair labor practices are charged so far as M & M employees are concerned.

Southern Californians, Inc. (SCI), another institutional respondent, was a corporation organized as a non-profit corporation in the autumn of 1937, having approximately 440 institutional members among all kinds of industry, and 50 individual members, some of whom were likewise members of M & M. Eight members of the Board of Directors out of a total of fifty Board members of SCI were also directors of M & M. SCI was supported by dues from its members and contributors, and where there was a duality of membership between M & M and SCI, a remission of dues for one month was made by SCI. SCI from funds collected as a so-called "community chest" allocated $2000.00 per month to M & M for a period of eleven months for use in the industrial relation activities of M & M.

The Neutral Thousands (TNT) was a non-profit corporation, incorporated about the same time as SCI. It was almost entirely supported by SCI, contributions between November 17, 1947, and March 15, 1939, amounting to $87,000.00. Dues from members of TNT were negligible. Membership was largely among women. It was under the direction of Mrs. Bessie Ochs, and had in its employ Rittenhouse and Huff who operated as a co-partnership under the name of Employees Advisory Service.

Petitioner, M & M, is admittedly not engaged in any commerce or industry on its own account, and could only be classified as engaged in commerce within the meaning of the Act by reason of its relationship to one or more of

its members. It is not an employer within the meaning of the Act unless it comes within the statutory definition of an "employer" contained in Section 2, subsection 2 of the Act which defines an employer as follows: "The term employer includes any person acting in the interest of an employer, directly or indirectly, * * *" M & M is charged with unfair labor practices because of its relationship to one or more of its members and the alleged activities of one of its subordinate employees in connection with the organization of a company dominated union among employees of the canvas manufacturing companies.

The Board and the court relying upon so-called background evidence found that petitioner M & M caused the incorporation of many industrial trade associations which entered into illegal contracts, the forms of which were furnished by M & M; advised the associations to engage the bargaining services of efficient members of the local bar; and daily gave counsel to agents of TNT. Referring to such background evidence the Circuit Court held the Board was warranted in inferring that all of the petitioner's, M & M's, extended labor activities in Southern California in the years since the passage of the National Labor Relations Act were infected with illegality. It held that the facts showed that principal M & M activities after passage of the Act in 1935 were formation of free employment bureau and strike breaking service; that M & M furnished guards and detectives with a claimed guarding of plants, and formation of company dominated unions.

M & M is the only respondent resisting the order of enforcement of the Board. A copy of the order of the Board as it relates to M & M is as follows:

"3. Each of the respondents, Southern Californians, Inc., The Neutral Thousands, Inc., G. L. Huff and Clay C. Rittenhouse, doing business as Employees Advisory Service, and Merchants and Manufacturers Association of Los Angeles, and the respective officers, directors, partners, agents, successors, and assigns of each of them, when acting severally, jointly, or in concert with the canvas companies, or any other employer, as agent for or in the interest of the canvas companies, or any such other employer, shall:

"a. Cease and desist from:

"(1) Dominating or interfering with the administration of Independent Canvas Workers Union, Inc., or with the formation or administration of any other labor organization of the *employees of the canvas companies, or any other employer,* and from contributing financial or other support to said Independent Canvas Workers Union, Inc., or to any other labor organization of the employees of the canvas companies, or any other employer;

"(2) Soliciting and collecting funds from the canvas companies, or any other employer, to be used in whole or in part for the *purpose of interfering with the rights guaranteed in Section 7 of the act;*

"(3) In any other manner interfering with, restraining, or coercing the *employees of the canvas companies, or of any other employer,* in the exercise of the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid and protection as guaranteed in Section 7 of the Act;

"b. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(1) Immediately send notices in writing through the United States mails to all its members, contributors, supporters and those carried on its mailing list, including the canvas companies, stating that each of them will not engage in the conduct from which it is ordered to cease and desist in paragraphs 3a (1) to (3) inclusive;"

II.

Jurisdiction.

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, 28 U. S. C. A. 347, and under 29 U. S. C. A. 160(e).

III.

Questions Involved.

1. THE FOLLOWING QUESTIONS CONCERNING THE SCOPE OF THE INJUNCTION ARE INVOLVED:

(a) Can the court properly enjoin acts entirely remote from and disassociated with the violation of the act charged in the complaint, to-wit: "soliciting and collecting funds from * * * any other employer, to be used in whole or in part for the purpose of interfering with the rights guaranteed in Section 7 of the Act";?

(b) Can the injunction of the court properly bring within its orbit persons, corporations, and others who were neither parties to the action, nor involved in any charge of unfair labor practices, and who may not even be employers or engaged in commerce?

(c) Is not the injunction broader in its scope than any remedial action which might be justified by the evidence, in that, in addition to the foregoing specifications in (a) and (b), it orders this respondent to cease and desist "in any other manner interfering with, restraining, or coercing the employees of the canvas companies, or of any other employer, in the exercise of the right to self-organization, to form, join or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining, or other mutual aid and protection as guaranteed in Section 7 of the Act."?

2. Has the Right of Freedom of Speech Been Abridged?

(a) Is the order of the Board and judgment of the court broad enough effectually and directly to abridge the right of freedom of speech? This question is particularly pertinent as the judgment of the court affects this petitioner who is a third party and has no economic relationship to the employees of any employer.

(b) Does the order of the board and judgment of the court as amended indirectly abridge the right of freedom of speech which it could not do directly? To enjoin contributions from members and others under jeopardy of contempt of court is effectually to destroy the right and ability to speak on the subject of the open shop or any other similar subject, and thereby the right to speak freely is abridged as effectually as by a direct mandate.

3. Evidentiary Questions Involved.

(a) Is there any legal evidence whatsoever which supports the finding of the Board and judgment of the court that M & M is

(1) An Employer within the definition of the Act;

(2) Engaged in commerce within the meaning of the Act;

(b) Is there any evidence to support the finding of the Board and the judgment of the court that M & M is engaged in or committed any unfair labor practices whatsoever?

(c) Is there any legal evidence to support the finding of the Board that,

> "The unfair labor practices committed by the respondents with respect to the employees of the canvas companies were in fact executed as an integral part of a coordinated scheme or plan designed by the institutional respondents as a means of assisting all employers of Southern California in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to such employees under the Act. Such coordinated plan, if again applied, will inevitably bring about a further concerted violation of the Act, similar in kind to the unfair labor practices found. Since the institutional respondents have publicly and persistently invited all employers of Southern California to enlist their services in introducing such plan among their employees, it is reasonable to assume, and we find, that the institutional respondents are fully equipped for, and ready to proceed with, the commission of similar unfair labor practices with respect to the employees of other employers, unless ordered to refrain from so doing,"?

(d) Is it legally permissible for the Board to admit hearsay evidence, secondary evidence, conclusions, and evidence entirely disconnected by time and circumstances with the facts complained of as unfair labor practices,

as (1) either background evidence, or (2) for the purpose of finding substantial facts upon which the order of the Board and judgment of the court as amended is necessarily predicated? Petitioner contends that such evidence is not legally admissible for either of these purposes.

4. Is the judgment of the court as amended in fact a violation of the Fifth and Fourteenth Amendments of the Constitution in that it deprives this petitioner of due process of law in any one or more of the following, particularly:

(a) That petitioner is charged with one particular violation of the Act, to-wit, the instigation and organization of a company dominated union, when in fact petitioner is convicted of another entirely different violation, namely, that, "the unfair labor practices committed by the respondents with respect to the employees of the canvas companies were in fact executed as an integral part of a coordinated scheme or plan designed by" this institutional petitioner "assisting all employers of Southern California in interfering with, restraining, and coercing their employees in the exercise of the rights guaranteed to such employees under the Act."

(b) In that there is a total absence of any legal evidence that this petitioner committed any unfair labor practices or violated the Act in any respect; or

(c) That the order of the Board and judgment of the court enforcing such order deprives petitioner effectually of its right to contract with its members and contributors and to receive from such members and contributors initiation fees, dues and other contributions without a hearing in the action under jeopardy of subsequent contempt of court.

IV.

Reasons Relied on for Allowance of Writ.

Petitioner relies on the following reasons for the issuance of the Writ of Certiorari herein prayed for:

A. The Ninth Circuit Court of Appeals has decided the questions here involved in a way probably in conflict with, and petitioner verily believes it to be in conflict with, the applicable decisions of this court.

B. The Ninth Circuit Court of Appeals has decided important questions of Federal law which have not been, but should be settled by this court, to-wit:

1. The scope of an injunction directed to an independent corporate entity that is a general industrial association, a party to the action, relating to employees of a member of that association;

2. The scope of an injunction affecting others not parties to the action or connected with the proceedings and possibly not employers or engaged in commerce within the meaning of the act;

3. The scope of an injunction and the correlative power of the court to punish for contempt the persons mentioned in 1 and 2 above based upon future acts of an equivocal character;

4. The scope of an injunction enforcing an order of the Board which restricts and limits under jeopardy of contempt of court the right and privilege to make and receive financial contributions from members of a general industrial association;

5. The scope of an injunction which indirectly abridges the right of freedom of speech as effectually as a direct mandate.

C. Important issues in the administration of the National Labor Relations Act are involved which should be determined by this Court, and for which the Writ of Certiorari should issue.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Honorable Court directed to the United States Circuit Court of Appeals, for the Ninth Circuit, directing that Court to certify and send to this Court for its review and determination, on a day certain therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket "No. 10533, National Labor Relations Board, Petitioner, vs. Sun Tent-Luebbert Company, *et al.*, and Merchants and Manufacturers Association of Los Angeles, Respondents," and that the judgment of said Court therein be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

Dated: May 8, 1946.

HARRY WILLIAM ELLIOTT,
JOHN F. GILBERT,
Counsel for Petitioner.

C. R. LESLIE,
Of Counsel.

Certificate of Counsel.

We hereby certify that the foregoing Petition is well founded and not interposed for delay.

HARRY WILLIAM ELLIOTT and
JOHN F. GILBERT,
Counsel for Petitioner.

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No. .....

MERCHANTS and MANUFACTURERS ASSOCIATION OF LOS ANGELES, a California corporation,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

I. The petitioner contends that the scope of the order of the Board and judgment of the court in its injunctive aspect goes beyond the limits of legal discretion as laid down by this court. A recent decision of this court in which this subject was exhaustively reviewed is *May Department Stores Co. v. N. L. R. B.*, 66 S. Ct. 203. The court properly pointed out "the possibility of contempt penalties by the court for future Labor Act violations adds sufficient additional sanctions to make material the difference between enjoined and non-enjoined employer activities." The court in the same case later clearly states,

"The test of the proper scope of a cease and desist order is whether the Board might have reasonably concluded from the evidence that such an order was necessary to prevent the employer before it 'from engaging in any unfair labor practice * * * affecting commerce.'" The court in the case mentioned quotes with approval from *N. L. R. B. v. Express Publishing Co.*, 312 U. S. 426,

> "To justify an order restraining other violations it must appear that they bear some resemblance to that which the employer has committed or that danger of their commission in the future is to be anticipated from the course of his conduct in the past." 312 U. S. at page 437.

This statement of law necessarily entails a consideration of the evidence, and an analysis of what constitutes evidence and what probative value the evidence has. Petitioner has never been charged with participating in or committing any unfair labor practice prior to the instant case, and has never been found guilty of having committed any unfair labor practices at any time or under any circumstances prior to the present case. Therefore, there is no "prior conviction" upon which the Board could rely. There is no threat of the commission of unfair labor practices. There is no strike or other labor trouble between petitioner and its employees and never has been. There is no threat of a violation of the Act or the commission of any unfair labor practice by the Board of Directors, any director individually, or any administrative agent. This would seem to bring the case within the ruling of the Board itself. In the case of *Roberts & Oaks and the Chamber of Commerce of Madison, South Dakota, etc.*, 50 N. L. R. B. 494, where it was determined by the Board that strong anti-union statements made by officers

of the Chamber of Commerce in their individual capacity were not an expression of the Chamber itself. Here there are no such statements or acts by the directors, or officers, or administrative officials of the petitioner. The United States Circuit Court for the Eighth Circuit in the case of *N. L. R. B. v. American Pearl Button Co. and Washington Chamber of Commerce, Washington, Iowa,* 149 F. (2d) 311, has followed the same reasoning in exonerating the Chamber of Commerce of any liability for statements or expressions of its officers and directors. The report says the court,

> "Certain witnesses were asked with reference to the discussion had at the meeting (of the directors of the Chamber of Commerce), but the important thing so far as the Chamber of Commerce is concerned, is not what the discussion was, but what action was taken. Whether individual members of the Chamber of Commerce after adjournment of the meeting, may have had further discussion, or even entered into some tacit understanding, would not be binding upon the Chamber of Commerce. Such action would be the responsibility of those who participated in it. What the opinion of such individuals might be as to the action taken can not be accepted in face of the unimpeached record as to what proceedings were in fact had."

The court declined to enforce the cease and desist order against the Chamber of Commerce. The Chief Justice in a concurring opinion states:

> "I do not have any doubt that expressions of hostility to union organization made by an employer to his employees, for the purpose of influencing their vote in a plant election, may, in the economic hold of a particular employment field or of some immediate

plant situation, amount to an improper interference with, and restraint and coercion of, the right of self-organization. But I have no less certainty of conviction that such expressions made by a third party, who is not shown by the evidence to have any legal identity with the employer, or to possess a separate coercive hold upon the employees, or where such a hold exists, to have attempted to exercise it, as by threats, express or implied, of capable reprisal, cannot broadly or loosely be branded as illegal interference, restraint, or coercion.

"The pendency of a local labor dispute cannot be made to impose a legal gag upon the community."

Petitioner itself is not engaged in commerce and is not an employer within the meaning of the Act unless it may be said to be acting in the interest of some employer directly or indirectly.

In the original decision of the court, Justice Stephens dissented to the application of the order to persons and organizations not parties in the case. He pointed out,

"the only authority suggested by the Board and by the majority in this court is *N. L. R. B. v. Express Publishing Co.,* (1941), *supra.* Nothing remotely like this was before the court in that case, and nothing said in the Supreme Court's opinion has the slightest application to such a situation. The Board's cease and desist order in the cited case was directed to the respondent, Express Publishing Co., in relation to its treatment of its own employees. Sentences, general in nature, torn from their context in the Supreme Court's opinion cannot serve as authority for a proposition not in this case. For this Court's analysis of the Express Publishing Co. case see

National Labor Relations Board v. Pacific Gas & Electric Co., 118 Fed. (2d) 780, 789 (1941), as set out in the majority's concurring opinions."

It is noteworthy that when the court of its own volition amended its first judgment of August 30, 1945, by its order of March 2, 1946, Justice Stephens did not join in the order amending its former judgment. The majority of the court apparently based its amendment upon *N. L. R. B. v. Cheney California Lumber Co.*, 66 S. Ct. 553. The reasoning of the majority of the Circuit Court in issuing its order of March 2, 1946, amending the former judgment of the court, is certainly far from satisfactory. The *Cheney California Lumber* case has "nothing remotely like this case"; in the first place the Supreme Court pointed out that the judicial review of orders of the Board was limited by Section 10(e) of the Act to those objections which had been urged before the Board. In the *Cheney* case no exceptions were made to the intermediate report of the trial examiner and no objections raised until the matter came before the Circuit Court.

Petitioner would like to point out further that the omnibus clause 1(b) in the case at bar is broader than any other omnibus clause heretofore presented to this court for consideration in that it includes all the rights guaranteed by Section 7 of the Act to the employees of the canvas companies here involved and also all the rights guaranteed by Section 7 of the Act to the employees of any other employer not in any manner here involved.

For the reasons hereinabove stated petitioner contends that the decision of the Ninth Circuit Court of Appeals as amended is not supported by the authority cited by the court, to-wit, *N. L. R. B. v. Cheney California Lumber*

Co., supra, but is in conflict with the applicable decisions of this court. *May Department Stores Company v. N. L. R. B.,* 66 S. Ct. 203, *Phelps Dodge Corp. v. N. L. R. B.,* 313 U. S. 177, *N. L. R. B. v. Express Publishing Co.,* 312 U. S. 426.

II. Petitioner contends that the Ninth Circuit Court of Appeals erred in its decision, as amended, to the extent of depriving petitioner of due process of law, in that it predicated its essential findings of fact and conclusions of law upon which the judgment was based upon collateral facts foreign to the charge upon which the complaint of the Labor Board rested, which facts were introduced into the case either as so-called "background evidence," or as pure hearsay evidence, and otherwise lacking qualifications of legal evidence upon which such judgment must be predicated. For illustration the court finds:

A. "We thus have evidence from which the Board could infer that M & M through its corporate agent Ryerson, conspired with TNT, the agency of SCI, to violate the National Labor Relations Act by the formation of an employer dominated union in the canvas industry."

B. "That is to say, the conspiracy was of the canvas companies as employer principals and the institutional association as their employer agents."

C. "The evidence is clear from which the Board could infer that counsellor Ryerson [designated as counsellor by the Circuit Court for the first time] was not only acting within the scope of his authority as one of M & M's industrial relations staff, but that he was performing an authorized and expected counselling function in so conspiring to violate the Act."

D. "The executive committee of M & M in reorganizing that association after the enactment of the National Labor Relations Act, declared among its objectives the violation of the Act. It stated, 'The employer will have to be convinced of the necessity and benefits of bargaining collectively with his own employees, that is, the desirability of training his employees to deal with him directly rather than through an outside labor organization. Our contacts so far have indicated that many employers have not the slightest conception of how this result can be obtained. Advice, counsel, and assistance in the attainment of this objective will have to be given over a long period of time.'"

E. "In the conspiracy to violate the Act the M & M agents caused the incorporation of many industrial trade associations. * * * (Referring particularly to the garment industry.) The employer members of the associations so formed by M & M entered into illegal contracts, * * *" (Quoting some clauses from what purported to be blank printed forms of such association's contracts unexecuted.)

F. "Incidentally, this means that while M & M's corporate associations were advised by M & M to engage the bargaining services of such efficient members of the bar as attorneys Neary, Watkins, Howlett, and others for their anti-union activities, (the first time Neary's name is mentioned in the case, Watkins being attorney for SCI, and Howlett, ex-president of M & M, being attorney for some of the canvas companies) the worker employees not only could not employ experienced labor organizers, but could not even organize."

G. "With this background of M & M's illegal purpose, intent and accomplishment the Board was war-

ranted in inferring that all of M & M's extended labor activities in Southern California in the years since the passage of the National Labor Relations Act, in which it expended large sums of money, were infected with a like illegality."

Then follows a reference to the free employment bureau sponsored by M & M and testimony concerning the payment to a detective agency in providing guards and detectives during a strike. The court then finds:

"Whether such a labor employment bureau and such use of detectives and their employees in strike breaking activities in themselves could have been conducted without violation of the Act is not a matter of our concern. The sole question we decide is that in view of the evidence of other contemporaneous (the facts shown by such evidence were not contemporaneous) illegal (necessarily prejudged) anti-labor (prejudically characterized) activities, the Board could infer that they were but a part of a broad and long continuing conspiracy (no conspiracy charged in the complaint) to frustrate and thus violate the National Labor Relations Act."

It was upon the acceptance of such evidence and the finding of such facts as hereinabove quoted that the Board based its generalization and all-inclusive finding set forth in the petition for Writ of Certiorari under subsection C, Paragraph 3, Evidentary Questions Involved, Roman numeral III, Questions Involved, at page 10 of this petition, which is in effect that the unfair labor practices committed with reference to employees of the canvas companies were an integral part of a coordinated scheme or plan designed by the institutional respondents as a means of assisting all employers of Southern California in the violation of the Act. Upon this conclusion the

Board attempts to justify, and the court in its order of March 2, 1946, amending its former judgment, attempts to justify the scope and extent of the injunctive relief granted.

This court has clearly stated the law in *Consolidated Edison Co., etc., et al. v. N. L. R. B.*, 305 U. S. 197,

> "The companies urge that the Board received 'remote hearsay' and 'mere rumor.' The statutes provide that 'the rules of evidence prevailing in courts of law and equity shall not be controlling.' The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. *Interstate Commerce Commission v. Baird*, 194 U. S. 25, 44; *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93; *United States v. Abilene & Southern Rwy. Co.*, 265 U. S. 274, 288; *Tagg Bros. & Moorhead v. United States*, 280 U. S. 420, 442. But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

Substantiating the foregoing authority see *N. L. R. B. v. American Pearl Button Co. and Washington Chamber of Commerce, Washington, Iowa*, 149 F. (2d) 311; *Roberts & Oaks and the Chamber of Commerce of Madison, South Dakota, etc.*, 50 N. L. R. B. 494.

Proof of one fact may not be taken as even *prima facie* evidence of another fact that it has no reasonable tendency to establish, and if the judgment of the court rests upon

such evidence it is lacking in due process of law. *McFarland v. American Sugar Refining Co.*, 241 U. S. 79. To the same effect, *St. Joseph Stock Yards Co. v. U. S.*, 298 U. S. 38.

The Act provides, Section 10(b), "Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice the Board * * * shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing, etc." This provision of the statute was followed in Section 10 of the complaint in which this respondent was specifically charged:

> "10. Respondents, Sun Tent-Luebbert Company; Mellus Brothers & Company, Inc.; Downie Brothers, Inc.; United Tent and Awning Company, Ltd.; California Canvas Jobbers Club; Southern Californians, Inc.; The Neutral Thousands, Inc.; G. L. Huff and Clay C. Rittenhouse, doing business as Employees Advisory Service; and Merchants and Manufacturers Association of Los Angeles, acting together through their officers, agents and employees, on or about December 2, 1937, and thereafter, did instigate and form a labor organization referred to herein as the Independent, and since that date said respondents continuously have dominated and interfered with the formation and administration of said labor organization by the following acts:"

Any so-called background evidence must be admissible solely upon the grounds that it tends to prove the commission of the unfair labor practice charged. The admission of background evidence is an exception, limited in its scope, and it is not admissible for the purpose of proving any other violation of the Act than the one specifically

required by the statute to be stated in the complaint. *Wigmore,* Section 304, points this out:

> "When the very doing of the act charged is still to be proved, one of the evidential facts receivable is the person's Design or Plan to do it. This in turn may be evidenced by conduct of sundry sorts as well as by direct assertions of the design. But where the conduct offered consists merely in the doing of other similar acts, it is obvious that something more is required than that mere similarity, which suffices for evidence of Intent (*Ante,* Sec. 302)."

In the present case the Board admitted hearsay evidence, secondary evidence of all kinds and in particular statements of witnesses relating to the formation of other alleged company dominated unions in other companies. There was no proof that such unions had actually been formed, only fragmentary hearsay statements. Respondents had no notice of any such charges of unfair labor practices, or that any such evidence would be offered. These statements were denied categorically by the directors, officers and administrative agents of the respondent who testified, but they were found to be facts in both findings of the Board and findings and judgment of the Court.

In *Wigmore,* Vol. 2, page 204, Section 304, it states:

> "Two necessary limitations are to be observed in the use of this class of evidence of Design: (2) The object being to argue to the act charged from a design or plan to do it, the prior acts are received to show that system; since, however, it may require a number of acts and circumstances to furnish the desired mass of conduct illustrating this design or system, and since the production of only parts or fragments

of it would in effect violate the principle and remain in evidence merely as affecting the defendant's character, the trial court must pass upon the offer beforehand, to see whether if offered in its entirety it satisfies the proper test and is sufficient to go to the jury; * * *"

Without reliance upon the hearsay evidence, collateral evidence and other evidence lacking in legal qualifications, including so-called background evidence of all kinds, the findings of the Board, particularly the all inclusive finding above quoted, could not have been made. There is no possibility of sustaining such finding upon any evidence relating to the charge of unfair labor practices specified in Section 10 of the complaint.

Therefore, petitioner maintains that such evidence was improperly admitted and erroneously relied upon to sustain the order of the Board and judgment of the court as amended, and that such error constituted lack of due process of law.

Petitioner furthermore contends that the judgment of the Ninth Circuit Court of Appeals as amended is in conflict with the applicable decisions of this court as the law is laid down in the cases hereinbefore cited, and the following Federal cases: *Cudahy Packing Co. v. N. L. R. B.*, 116 F. (2d) 367; *Magnolia Petroleum Co. v. N. L. R. B.*, 112 F. (2d) 545; *Everglades Drainage District v. Florida Ranch & Dairy Corp.*, 74 F. (2d) 914; *U. S. v. Nelson*, 102 F. (2d) 515.

III. The petitioner contends that the order of the Board, and the judgment of the Ninth Circuit Court of Appeals, as amended, enforcing the Order, abridge, directly and indirectly, the right of freedom of speech guaranteed by the First Amendment to the Constitution as effectually as by a direct mandate.

The M & M as a non-profit organization is not engaged in any business or commerce, and is dependent for its entire revenue upon initiation fees and dues from its members. Adherence to an active support of the principal of the open shop has characterized the organization for a number of years past. It has not been silent in proclaiming its adherence to this principal. A large part of the evidence admitted from the files of M & M bore upon this subject. When the court enforces the order of the Board directing this petitioner to "cease and desist from collecting moneys, etc.", and "to notify, etc." it effectually cuts off sources of revenue from which the M & M derives the means to express its views. Admittedly if the collection of moneys which are to be expended for certain purposes is enjoined the contributors of M & M are going to cease their contributions, when the expenditure of such contributions might later be found to be unlawful labor practices because coupled with other acts. The order of the Board and the judgment of the Court would destroy the organization because of fear of the possibility of contempt proceedings being brought against any such contributor.

The obvious limitation upon the right of freedom of speech by such indirection, or oblique effect of the judgment of the court enforcing the order of the Board, is no less a violation of the constitutional right of freedom of speech because it is an indirect effect. For this reason the judgment of the court as amended is in conflict with the applicable decisions of this Court. *Thomas v. Collins,* 323 U. S. 819; 65 S. Ct. 315. In the last named case the Court finds, page 530,

> "For these reasons any attempt to restrict those liberties must be justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. * * * Accordingly, whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation. It is therefore in our tradition to allow the widest room for discussion, the narrowest range for its restriction, particularly when the right is exercised in conjunction with peaceable assembly. * * * This conjunction of liberties (contained in the First Amendment) is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience. Citing cases."

Marsh v. State of Alabama, 66 S. Ct. 276, decided Jan. 7, 1946, likewise substantiates the proposition that the freedom of speech may not be abridged indirectly any more than it can be abridged directly. The Court points out,

> "* * * the right to exercise the liberties safeguarded by the First Amendment 'lies at the founda-

tion of free government by free men' and we must in all cases 'weigh the circumstances and appraise * * * * the reasons * * * in support of the regulation of (those) rights.' *Schneider v. State,* 308 U. S. 147."

IV. Petitioner contends that the judgment of the court as amended enforcing the order of the Board does in fact deprive this petitioner of its property without due process of law in that it prevents M & M from entering into any contractual relationship with its members whereby its members contribute funds to the M & M for purposes *ab initio* lawful in themselves, but which, by reason of being connected with other acts at a later time for which the M & M might be legally held responsible, become unlawful and thereby subject the M & M and its members and contributors to the jeopardy of contempt proceedings for violation of the court's judgment. See cases previously cited, and *Bridges v. California,* 314 U. S. 252.

In conclusion it is respectfully submitted that this Court should issue its Writ of Certiorari to the United States Circuit Court of Appeals in this action.

Respectfully submitted,

HARRY WILLIAM ELLIOTT,
JOHN F. GILBERT,
Counsel for Petitioner.

C. R. LESLIE,
Of Counsel.